In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 916

JULIUS W. HOBSON, PATRICIA S. ROSEMOND, GROVER C. DYE, AND WILLIAM HIGGS, PETITIONERS

v.

THE HONORABLE OLIVER GASCH, DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners are citizens and taxpayers of the District of Columbia. They sought in the court of appeals the issuance of a writ of mandamus directing the respondent to convene a three-judge court under 28 U.S.C. 2282 to hear their complaint challenging the constitutionality of the form of government provided by Congress for the District of Columbia. The court of appeals denied the application without opinion, and petitioners now seek review of that denial.

245-581—67

In their class action in the district court, petitioners alleged that the congressional enactments [1] providing for appointed commissioners to exercise governmental powers in the District of Columbia are unconstitutional. While several different constitutional provisions were invoked (see Pet. 4), the essence of petitioners' position was that the citizens of the District of Columbia have a constitutional right to elect representatives to govern them with respect to "local" matters. Petitioners requested the convening of a three-judge court, an injunction against the enforcement of the challenged statutes, a direction that at-large elections be held for the positions on the Board of Commissioners of the District of Columbia, and the designation of an interim Board of Commissioners pending the holding of elections. In a written opinion (255 F. Supp. 295) filed on May 4, 1966, the respondent determined that the constitutional questions were insubstantial, and on that ground denied the application for a three-judge court. On August 9, 1966, without any further proceedings having taken place in the district court, petitioners filed their application in the court of appeals for a writ of mandamus.[2]

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[1] 20 Stat. 103, 26 Stat. 1113; Sections 1–201 and 1–202 of the District of Columbia Code, which provide for presidential appointment of three commissioners of the District, with Senate confirmation. One of the three is required to be an officer of the U.S. Army Corps of Engineers.

[2] The propriety of the procedural route followed by petitioners is questionable. The correctness of a single district judge's refusal to convene a three-judge court may, in an appropriate case, be raised by an appeal to the court of appeals under 28 U.S.C. 1291, 1292. This is plainly so where the district court's order is a final one, in the sense that the appellants

Apart from any question concerning the procedure petitioners invoked to obtain review of the respondent's action, petitioners were not entitled to a hearing before a three-judge court. A three-judge court is required in an action seeking to restrain the enforcement of a statute on constitutional grounds only where the constitutional question presented is a substantial one, and a single district judge has jurisdiction to determine initially the substantiality of the constitutional question.[3] The question raised by the complaint here is, in the light of settled authority, insubstantial.

The contention that only a body composed of persons elected by District of Columbia citizens may constitutionally govern the District with respect to "local" matters necessarily involves the contention that Congress' authority over the District is limited to "national" matters and, perhaps, to procedural mat-

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are "effectively out of court," or, although not final, is nevertheless appealable as an interlocutory order pursuant to the provisions of Section 1292. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n. 2. In such circumstances the court of appeals has power to give "guidance" if it determines that the district judge erroneously declined to convene a three-judge court. *Id.* at 716. Where review on appeal is available, a mandamus proceeding in the court of appeals would appear inappropriate. Cf. *Ex parte Fahey*, 332 U.S. 258, 260. Here petitioners filed their mandamus proceeding after the time within which to file an appeal in the court of appeals, under 28 U.S.C. 2107, had expired. In any event, whether mandamus or an appeal was appropriate here as a procedural matter is inconsequential, since petitioners' request for a three-judge court was properly denied by the district court, and the court of appeals was correct in upholding that determination by denying the mandamus petition.

[3] *Ex parte Poresky*, 290 U.S. 30, 31–32; *Bailey* v. *Patterson*, 369 U.S. 31, 33.

ters concerning the election of a local governing body. However, Article I, § 8, cl. 17 of the Constitution authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever, over" the District. Under this provision, Congress has "full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia * * *." *Shoemaker* v. *United States,* 147 U.S. 282, 300. As early as 1838 this Court stated that "Congress has the entire control over the district, for every purpose of government * * *." *Kendall* v. *United States,* 12 Pet. 524, 619. This Court has held on several occasions that Congress' power under the Constitution to legislate with respect to the District is as great as the power of a State legislature with respect to the State or any of its subdivisions.[4]

Moreover, in upholding the power of Congress to tax residents of the District of Columbia, where those challenging the taxation asserted (as did petitioners in their complaint in the district court) "that representation in inseparable from taxation," Chief Justice Marshall reasoned in his opinion for the Court that those persons choosing to reside in the District of Columbia have "voluntarily relinquished the right of representation, and * * * adopted the whole body of congress for [their] legitimate government * * *." *Loughborough* v. *Blake,* 5 Wheat. 317, 324. While Congres may delegate its governmental authority over the District to a locally elected body, any such grant

[4] *Mattingly* v. *District of Columbia,* 97 U.S. 687, 690; *Gibbons* v. *District of Columbia,* 116 U.S. 404, 407–408; *Capital Traction Co.* v. *Hof,* 174 U.S. 1, 5; *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 434–435.

of home rule is "subject also to the power of Congress at any time to revise, alter, or revoke the authority granted." *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 109.

Petitioners' argument, that citizens of the District of Columbia have a constitutional right to elect representatives to govern them in local matters, and that to this extent Congress' power over the seat of government is limited, cannot be squared with the broad authority over the District given to Congress by the Constitution, nor with the unbroken line of decisions construing and upholding that authority.

In addition to relying upon a claimed constitutional right to vote for local government officials, petitioners also asserted that the statutory provisions for appointed commissioners to exercise governmental functions in the District of Columbia violate the Fifteenth Amendment. Of course, the Fifteenth Amendment is applicable to the federal government. But there is no basis for the contention that citizens of the District have been denied the "right * * * to vote * * * on account of race * * *." As previously pointed out, citizens of the District have no constitutional right to vote for local government officials. In declining to provide by statute for elected officials to govern the District of Columbia, Congress has made no distinctions based upon race. All citizens of the District are treated alike in regard to voting; none can presently elect local officials.

No question is here raised about the power of Congress to provide for home rule for the District of Columbia, by authorizing the election of governing officials for local matters. Congress clearly has that

power, has exercised it in the past, and has considered the enactment of home-rule legislation in recent years. Rather, the position here taken is simply that such a decision involves a matter plainly and unequivocally committed by the Constitution to the legislative branch. Nor does this position mean that citizens of the District are not entitled to those rights which are conferred by the Constitution on all citizens of the United States. See, *e.g.*, *Hurd* v. *Hodge*, 334 U.S. 24; *Bolling* v. *Sharpe*, 347 U.S. 497. Finally, the position here espoused should not in any way be viewed as one indicating any opposition by the executive branch to Congress' determining to provide for home rule for the District. Indeed, the President has publicly commended the enactment of such legislation to Congress on several occasions in the recent past. Such a decision however, is beyond peradventure constitutionally committed to Congress, and not to the judicial or executive branches.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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